Supreme Court, U.S.
FILED
06-1056 JAN 23 2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

THE COCA-COLA COMPANY and
THE COCA-COLA EXPORT CORPORATION,

Petitioners,

v.

RAPHAEL BIGIO, BAHIA BIGIO, FERIAL SALMA BIGIO
and B. BIGIO & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, two U.S. multinational corporations located in Atlanta, acquired through subsidiaries a minority ownership in an Egyptian bottling corporation in 1994. In 1997 the three individual plaintiffs, citizens and residents of Canada and their closely held Egyptian corporation, sued petitioners in the Southern District of New York for trespass upon real property located in Egypt. Plaintiffs claim ownership of the property, alleging that it was wrongfully expropriated by the Egyptian government in 1964. The Egyptian bottling corporation occupies the property under lease from an entity owned by the Egyptian government. The District Court dismissed the action under the doctrine of *forum non conveniens*, concluding after a thorough analysis of the relevant factors that the action had no connection with the Southern District and virtually none with any other U.S. District.

The Second Circuit reversed. It did not find the District Court had abused its discretion or had made any erroneous fact findings in determining that an adequate alternative forum exists in Egyptian courts or in balancing the relevant public and private factors outlined in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), all of which the District Court found strongly to favor dismissal in favor of Egypt consistent with the Second Circuit's observation in a prior appeal in the case. The Second Circuit held that the District Court did not accord sufficient deference to the foreign plaintiffs' choice of a U.S. forum. Instead of remanding to the District Court to conduct further analysis, a divided panel substituted its own judgment on *de novo* review and afforded the foreign plaintiffs' choice of forum virtually conclusive weight, despite the holdings in *Piper Aircraft Co. v. Reyno*, 454 U.S.

235 (1981), that foreign plaintiffs' forum choice is entitled to little deference and that the trial court's decision may be overturned only for "clear abuse of discretion." The Second Circuit announced a standard that directly conflicts with the settled *Gilbert* and *Piper* precedents and puts the Second Circuit's *forum non conveniens* and appellate review standards in direct conflict with the law of the other Circuits.

Three questions are presented:

(1) Whether the Second Circuit committed plain error in disregarding the clear rule of law articulated in *Piper* and followed by all other Circuits when it adopted and applied a standard giving nearly conclusive weight to foreign plaintiffs' choice of forum over all the other established public and private interest factors applicable to a *forum non conveniens* determination?

(2) Whether the Second Circuit committed plain error when it adopted and applied a standard of *de novo* appellate review and reversed the District Court's decision without finding a clear abuse of discretion in direct derogation of the holding in *Piper* and the standard of appellate review followed by other Circuits?

(3) Whether the Second Circuit's plain error warrants reversal and reinstatement of the District Court's decision on the authority of *Gilbert* and *Piper*?

29.6 STATEMENT

The Coca-Cola Company is a publicly traded corporation and the owner of all the shares of The Coca-Cola Export Corporation. The Coca-Cola Company has no parent corporation. No publicly held corporation owns 10% or more of The Coca-Cola Company's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vi
TABLE OF APPENDICES	xii
OPINIONS BELOW	1
JURISDICTION	1
STATUTE AND RULES INVOLVED	1
STATEMENT OF THE CASE	1
The District Court's Decision	3
The Second Circuit Majority Opinion and Dissent	6
REASONS FOR GRANTING THE PETITION	9
I. The Second Circuit's Decision Directly Contravenes this Court's Holding in *Piper* and Conflicts with the Law of All Other Circuits by Adopting a Standard that Accords	

Contents

Page

Foreign Plaintiffs' Choice of Forum Virtually Conclusive Weight Among the Relevant *Forum Non Conveniens* Factors 10

II. The Second Circuit's Decision Directly Contravenes *Piper* and the Law of the Other Circuits by Adopting an Appellate Review Standard that Removes the Fact-Intensive *Forum Non Conveniens* Decision from the Trial Court's Sound Discretion Without a Finding of Clear Abuse of Discretion 20

III. The Decision Below Should Be Reversed and the District Court's Decision Should Be Reinstated 24

CONCLUSION 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Aguinda v. Texaeo, Inc.,
303 F.3d 470 (2d Cir. 2002) 17

Am. Dredging Co. v. Miller,
510 U.S. 443 (1994) 21, 22

Basquez v. Bridgestone/Firestone,
325 F.3d 665 (5th Cir. 2003) 21

Bhatnagar v. Surrendra Overseas Ltd.,
52 F.3d 1220 (3d Cir. 1995) 10

Bigio v. Coca-Cola Co.,
239 F.3d 440 (2d Cir. 2000) 1, 2, 4

Blanco v. Banco Indus. de Venezuela, S.A.,
997 F.2d 974 (2d Cir. 1993) 17

Capital Currency Exch., N.V. v Nat'l Westminster Bank PLC.,
155 F.3d 603 (2d Cir. 1998) 22

El-Fadl v. Cent. Bank of Jordan,
75 F.3d 668 (D.C. Cir. 1996) 23

Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.,
955 F.2d 368 (5th Cir. 1992) 11, 23

Cited Authorities

Page

Florian v. Danaher Corp.,
No. Civ. A. 300CV897, 2001 WL 1504493
(D. Conn. Nov. 20, 2001), *aff'd*, 69 F. App'x 473
(2d Cir. 2003) 19

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947) ..... *passim*

Howe v. Goldcorp Invs. Ltd.,
946 F.2d 944 (1st Cir. 1991) 13, 21, 22

Iragorri v. United Techs. Corp.,
274 F.3d 65 (2d Cir. 2001) 12, 14, 21

Jackson v. Am. Univ., in Cairo,
52 F. App'x 518 (D.C. Cir. 2002) 17

Kerr v. Inamed,
51 F. App'x. 718 (9th Cir. 2002) 10

Koster v. (Am.) Lumbermens Mut. Cas. Co.,
330 U.S. 518 (1947) 21

McNeil v. Stanley Works,
33 F. App'x 322 (9th Cir. 2002) 19

Monegasque de Reassurances S.A.M. v.
NAK Naftogaz of Uk.,
311 F.3d 488 (2d Cir. 2002) 17

Cited Authorities

Page

Murphy v. Schneider Nat'l, Inc.,
362 F.3d 1133 (9th Cir. 2004) 23

Murray v. BBC,
81 F.3d 287 (2d Cir. 1996) 17

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899 F. Supp. 164 (S.D.N.Y. 1995),
aff'd, 104 F.3d 351 (2d Cir. 1996) 17

Pacific Car and Foundry Co. v. Pence,
403 F.2d 949 (9th Cir. 1968) 11

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116 F. Supp. 2d 415 (S.D.N.Y. 2000) 17

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) ..... *passim*

Polanco v. H.B. Fuller Co.,
941 F. Supp. 1512 (D. Minn. 1966) 17

Pollux Holding Ltd. v. Chase Manhattan Bank, N.A.,
329 F.3d 64 (2d Cir. 2003) 12, 22

Rasoulzadeh v. Associated Press,
574 F. Supp. 854 (S.D.N.Y. 1983),
aff'd, 767 F.2d 908 (2d Cir. 1985) 11

Cited Authorities

Page

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 15

Riviera v. Hewlett Packard Corp.,
95 F. App'x 241 (9th Cir. 2004) 17

Rustal Trading US, Inc. v. Makki,
17 F. App'x 331 (6th Cir. 2001) 17

Satz v. McDonnell Douglas Corp.,
244 F.3d 1279 (11th Cir. 2001) 21

SSI Corp. v. Matsuda,
175 F. App'x 168 (9th Cir. 2006) 21

Stewart v. Dow Chem. Co.,
865 F.2d 103 (6th Cir. 1989) 19

Sussman v. Bank of Israel,
801 F. Supp. 1068 (S.D.N.Y. 1992),
aff'd, 990 F.2d 71 (2d Cir. 1993) 17

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421 F.3d 129 (2d Cir. 2005) 14

In re Union Carbide Corp.,
809 F.2d 195 (2d Cir. 1987) 11

Cited Authorities

Page

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465 F.3d 418 (10th Cir. 2006) 23

Younis v. Am. Univ., in Cairo,
30 F. Supp. 2d 390 (S.D.N.Y. 1998) 17

Statutes:

28 U.S.C. § 1254(1) (2007) 1

28 U.S.C. § 1332 (2007) 1

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TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided May 9, 2006 ..... 1a

Appendix B — Opinion Of The United States District Court For The Southern District Of New York Dated February 3, 2005 ..... 8a

Appendix C — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Filed October 31, 2006 ... 22a

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-7a) is reported at 448 F.3d 176. The opinion of the District Court (App. B, *infra*, 8a-21a) is unpublished but unofficially reported at 2005 WL 287397.

JURISDICTION

The Court of Appeals' order was entered on May 9, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2007). The District Court's jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332 (2007), after the Court of Appeals dismissed the plaintiffs' Alien Tort Claims Act claim in an earlier appeal, *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 454 (2d Cir. 2000).

STATUTE AND RULES INVOLVED

There are no constitutional provisions, treaties, statutes, ordinances, or rules involved in the case.

STATEMENT OF THE CASE

The plaintiffs are three Canadian, formerly Egyptian, residents and citizens and an Egyptian corporation. They commenced this action against the petitioners in the United States District Court for the Southern District of New York,

seeking damages for trespass to real property located in Egypt. The property in question was allegedly expropriated by the Egyptian Government during the Nasser regime and is held by an Egyptian government-owned entity, Misr. The Egyptian Ministry of Finance, according to plaintiffs, ordered the Egyptian Government to return the expropriated property to the plaintiffs or pay them its value, which the plaintiffs claim it has not done.

Misr leased the property to an Egyptian corporation. In 1994, the petitioners, through subsidiaries, purchased a minority stock interest in the Egyptian tenant. The plaintiffs brought and renewed at least ten actions against Egyptian government individuals and entities, but not the petitioners, in Egyptian courts in 1980 and from 1993 through 1997. The plaintiffs permitted their lawsuits, or most of them, to be dismissed for non-prosecution. They began this action in New York in 1997 against the petitioners as owners of the minority shareholders of the Egyptian tenant, but not against Misr, the Egyptian tenant, or Egyptian government entities.

The petitioners moved to dismiss on several grounds. The Second Circuit affirmed the District Court's dismissal of the plaintiffs' Alien Tort Claims Act claim with instructions that the District Court rule at the outset on whether the case should be dismissed in the exercise of its discretion. The District Court granted the petitioners' motion to dismiss under the doctrine of *forum non conveniens*.[1]

---

[1] The Second Circuit's earlier decision left only the plaintiffs' common law claim. In remanding, the Second Circuit expressly noted that the case's contacts with Egypt were "undeniably strong." *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 454 (2d Cir. 2000).

The District Court's Decision

The District Court (Barbara Jones, D.J.), dismissed the action under the doctrine of *forum non conveniens*, issuing a carefully written opinion based on a full evidentiary record. App. B, *infra*, 8a-21a. The District Court first addressed the degree of deference to be accorded the plaintiffs' choice of forum under this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The court acknowledged that "[t]here is ordinarily a strong presumption in favor of the plaintiff's choice," but it noted that the choice of foreign plaintiffs, like the Bigios here, "is generally given less deference, because the presumption of convenience is diminished." App. 17a. Nevertheless, the court recognized that "'some weight must be given to a foreign plaintiff's choice of forum.'" *Id.* (citation omitted).

The court next considered whether there was an adequate alternative forum. After careful analysis, it held that there was such a forum, Egypt. The court noted that both petitioners had stipulated to personal jurisdiction in Egypt for purposes of this action and that there was no dispute that Egyptian law and procedure permit litigation of the instant claims. App. 15a, 18a.[2]

The District Court considered plaintiffs' argument that, as Jews, their lives would be at risk if they litigated the case in Egypt. The court found that argument was not supported by the record. App. 16a. First, it noted that the plaintiffs had submitted no evidence that their lives or safety would be in jeopardy by litigating in Egypt. It further found that the newspaper articles

[2] The District Court did not preclude the possibility of other adequate fora, such as plaintiffs' home forum, Canada, but focused on Egypt given the Second Circuit's prior observation of the lawsuit's "undeniably strong" connection to Egypt. App. B at 15a. Having found Egypt an adequate alternative forum, there was no need for the court to consider other available fora at that time.

the plaintiffs cited as proof did not demonstrate physical danger, an Egyptian governmental endorsement of racist attitudes, or a danger to Jews litigating in Egypt; the court noted that the articles actually referred to thousands of other pending lawsuits in Egypt like those brought by the plaintiffs. App. 16a. Second, the District Court noted that the plaintiffs had themselves filed a number of similar actions in Egypt in 1980 and again in and after 1993, all of which were dismissed because of the plaintiffs' failure to prosecute them, a fact the plaintiffs did not dispute. App. 10a-11a, 16a. The court also considered the plaintiffs' argument that their alleged emotional burden should be taken into account in a *forum non conveniens* analysis. The court noted that the leading Second Circuit decision on this factor emphasized a court's interest in honoring a plaintiff's desire to litigate in its *home* forum, citing *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000), a consideration that did not apply to these plaintiffs, who elected to sue in the U.S. and not in their home forum of Canada. App. 18a.

The court next analyzed all the "public" and "private interest" factors set out in this Court's decision in *Gilbert*. As to the private factors, the court found, as the Second Circuit had noted in its prior decision in the case, 239 F.3d at 453, that evaluation of plaintiffs' claim against the petitioners "requires first understanding what actions the Egyptian government took regarding the Plaintiffs' property in the early 1960's and late 1970's" and could not be determined "without first addressing the status of Plaintiffs' underlying Egyptian claim." App. 19a.

The District Court next found that the relevant evidence, documents, non-party witnesses, and the property itself were located in Egypt, with the documents likely to be in Arabic and many witnesses potentially unable to speak English. App. 19a. It noted that "Egyptian law as it existed in 1962 and 1977 will

be crucial to this case, and that an Egyptian court is far better equipped to interpret that law than this Court." App. 19a. On the other side, the court found that "almost nothing relevant occurred in the United States, and nothing at all in the Southern District of New York," where the plaintiffs chose to bring their action. App. 20a.

The District Court next analyzed the public interest factors, which it found "overwhelmingly favor Egypt as the more appropriate forum." App. 20a. The court noted Egypt's particularly significant interest in deciding this case, pointing out that, "[n]ot only is Egypt the country with the most significant factual relationship to this litigation," but the case could have far-ranging precedential implications for the Egyptian government. App. 21a. "[T]he Bigios are not the only family who may have lost property under Nasser's government on account of their religion or ethnicity." App. 21a. The court found that "[n]ot only are Egyptian courts better prepared to untangle the legal knot of this case, they have a have a strong interest in maintaining whatever precedent may already have developed on the matter." App. 21a.

The court also considered the unfairness of imposing the litigation on the Southern District of New York, a forum with no connection to the dispute:

> To allow foreign nationals to bring such suits in this District (or elsewhere in the federal courts) would place a burden on the courts — a burden that would not be justified in light of the *de minimis* connection between Plaintiffs' loss of property that occurred outside of the United States and this district.

App. 20a. The court also noted that "[t]rying this case would require the diversion of resources from other cases having more

connection to this district," "one of the busiest districts in the country" and "one of the congested centers of litigation referred to in [*Gilbert*]." App. 20a. The court also took note of this Court's admonition that "jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." App. 21a (quoting *Gilbert*).

Having considered the weight to be accorded to the foreign plaintiffs' choice of forum, finding at least one adequate alternative forum, and carefully weighing all the private and public *Gilbert* factors, the court held that the case should be dismissed under the doctrine of *forum non conveniens*.

The Second Circuit Majority Opinion and Dissent

On appeal to the Second Circuit, the District Court's decision was reversed by a 2-1 panel majority. Although the majority stated that the District Court had articulated the correct legal standard, App. 5a, and although it did not find that the District Court had abused its discretion, it nevertheless reversed, without remand, holding that the District Court's decision was "erroneous as a matter of law." The majority based this conclusion on its assumption that the District Court gave "no weight whatsoever" to the foreign plaintiffs' forum preference. App. 5a. The majority did not consider the possibility that the District Court had found the amount of deference to be accorded to these foreign plaintiffs' choice of forum was outweighed by the private and public interest factors it determined to "overwhelmingly favor Egypt."

The panel majority concluded that the foreign plaintiffs' choice of the U.S. forum was entitled to "considerable deference," based on its statement, unsupported by the record, that the plaintiffs were "[u]nable to obtain relief in the Egyptian

courts." App. 2a. The panel majority ignored the District Court's fact finding, not disputed by the plaintiffs, that their Egyptian lawsuits were dismissed for their failure to prosecute them. Although the majority acknowledged that the plaintiffs could have brought the suit in their home forum, Canada, App. 5a, it declined to consider Canada as an alternative forum because the District Court had not compared the U.S. forum to Canada, and it did not remand with instructions for the District Court to do so.[3]

The Second Circuit did not find any abuse of discretion by the District Court, much less a clear abuse of discretion. The majority, however, undertook its own *de novo* evaluation, in which it declined to address many of the District Court's record-based fact findings. It ignored the District Court's finding that, as the Second Circuit itself had noted on the prior appeal, a judicial evaluation of plaintiffs' claim required an understanding of the Egyptian government's actions and could not be determined without addressing the status of plaintiffs' underlying claim under Egyptian law. It disregarded the District Court's finding that the evidence, witnesses, documents, and property were located in Egypt and the central importance of Egyptian law. It dismissed the District Court's finding that many lawsuits similar to the plaintiffs' action were pending in Egypt and that the Egyptian government's role in the ownership of the real property at issue gave Egypt a strong interest in maintaining precedent, noting only that the Egyptian government had not interposed an objection in the U.S. court proceeding. App. 6a.

Rather than remand with instructions that the District Court explain its evaluation of the deference to be accorded to the

[3] The panel majority disregarded the District Court's repeated observations (18a, 20a) that the plaintiffs had chosen not to sue in their home forum.

plaintiffs' choice of forum or to reconsider the motion under what it deemed the correct legal standard, the Second Circuit held that the *forum non conveniens* dismissal was "erroneous as a matter of law" and reversed. App. 7a. The panel majority proceeded to substitute its own discretion for the District Court's, finding that "none of the alleged private or public inconveniences referenced by the district court overcomes the preference reasonably here accorded plaintiffs in their choice of a U.S. forum." App. 7a.

Judge Leval dissented, concluding that "the proper outcome of this complex question upon application of the correct test is not clear, and may involve discretionary findings on disputed facts," and therefore, that "[i]t should be resolved in the first instance by the district court." App. 7a.

Petitioners filed a timely petition for panel reconsideration or *en banc* rehearing, which was denied on October 31, 2006. Petitioners now seek this Court's certiorari review of the three questions presented.[4]

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[4] The issues presented in this petition are ripe for review despite the case's interlocutory status because the decision whether to dismiss on *forum non conveniens* grounds should be made at the outset of the lawsuit, as it was in *Gilbert*, *Piper* and other cases arising under the doctrine. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 4.18 at 260 (8th ed. 2002). The purpose of the doctrine would be defeated otherwise.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision announces standards that contradict two fundamental precepts established by this Court's precedents. First, this Court held that a foreign plaintiff's choice of forum is entitled to less deference than a domestic plaintiff's choice, and little weight among the factors relevant to the *forum non conveniens* decision. All Circuits followed this rule, but the Second Circuit adopts a new standard, elevating foreign plaintiffs' forum choice to virtually conclusive weight over all other factors. Second, this Court held that the *forum non conveniens* decision lies in the discretion of the trial court and can be overturned only for a "clear abuse of discretion." All other Circuits have followed this rule, but the Second Circuit's decision supplants the "clear abuse of discretion" standard of review with *de novo* review by the appellate court. In addition, when the panel majority undertook its own *forum non conveniens* balancing test, it disregarded the factual record and abused its discretion by failing to accord the proper weight to the relevant factors.

Since deciding *Piper* over 25 years ago, this Court has not addressed the fundamental principles governing the important *forum non conveniens* doctrine. That doctrine serves a crucial function in regulating access to United States courts in a time of increasing internationalization of disputes, increasing U.S. court congestion, and increasing temptation to engage in forum shopping, problems this Court has repeatedly cited in its *forum non conveniens* precedents. The Second Circuit's decision sweeps aside the bedrock rules established in *Piper* and in *Gilbert* and creates a split in the Circuits over both the deference to be given foreign plaintiffs' forum choice and the nature of appellate review of district courts' discretionary decisions in this area.

The Second Circuit is an important center for international litigation and the district courts in that Circuit suffer from great congestion. The dangers of the Second Circuit's decision, beyond its plain error on the facts and law in this case, are threefold: it creates confusion among the federal courts over two previously settled rules of law in a crucial area; it deprives the district courts of the discretionary authority this Court vested in them; and it throws open the doors of overburdened U.S. courts to foreign litigants asserting claims more appropriately determined by courts of other jurisdictions.

I. The Second Circuit's Decision Directly Contravenes this Court's Holding in *Piper* and Conflicts with the Law of All Other Circuits by Adopting a Standard that Accords Foreign Plaintiffs' Choice of Forum Virtually Conclusive Weight Among the Relevant *Forum Non Conveniens* Factors

Since the *Piper* decision in 1981, the uniform rule in federal *forum non conveniens* law has been that deference is afforded to an *American* plaintiff's choice of its *home* forum but that a foreign plaintiff's choice of a United States forum is entitled to less deference, and in fact is entitled to little weight among the relevant governing factors. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 242 (1981). In *Piper*, the Court reinstated the District Court's holding that the foreign "plaintiff's choice of forum was entitled to little weight" as "the courts have been less solicitous when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." 454 U.S. at 242, 254. All Circuits have applied this rule.[5]

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[5] *E.g., Kerr v. Inamed*, 51 F. App'x. 718 (9th Cir. 2002); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1226 n.4 (3d Cir. 1995) ("the (Cont'd)

The decision below, however, announces an entirely different standard, affording foreign plaintiffs' forum choice a substantial, nearly conclusive, weight over all other factors.

The rule of limited deference to a foreign plaintiff's decision to sue in the United States is firmly rooted in the purpose served by the *forum non conveniens* doctrine. When the home forum is chosen, it is reasonable to assume that the choice is convenient. "When the plaintiff is foreign, however, this assumption is much less reasonable. *Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.*" *Piper*, 454 U.S. at 256 (emphasis added). A foreign plaintiff's decision to sue here ordinarily is not motivated by considerations of convenience but rather a tactical evaluation that U.S. courts may

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(Cont'd)
amount of deference is lessened when a foreigner has brought suit"); *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterwesar, A.G.*, 955 F.2d 368, 373 (5th Cir. 1992) ("a foreign plaintiff's choice of forum merits less deference"); *In re Union Carbide Corp.*, 809 F.2d 195, 202-03 (2d Cir. 1987) ("[l]ittle or no deference"); *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968) (plaintiff's choice of forum "is entitled only to minimal consideration" when "the forum of original selection . . . has no particular interest in the parties or subject matter"). An exception has been recognized where the evidence demonstrates that the foreign plaintiff's physical safety would be seriously jeopardized in his home forum. *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff'd*, 767 F.2d 908 (2d Cir. 1985) (finding that, "if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot."). There is no evidence in the record of a threat to these plaintiffs' lives or safety in Egypt, much less in their home forum of Canada. The selected newspaper articles offered by the plaintiffs, as the District Court found (15a-16a, 18a), do not establish such a danger and, in fact, undermine the plaintiffs' contention.

provide more liberal procedures and a higher recovery. *Id.* As the Second Circuit noted in a leading decision:

> [W]hen a foreign plaintiff chooses a U.S. forum . . . , a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries. Even if the U.S. district was not chosen for such forum-shopping reasons, there is nonetheless little reason to assume that it is convenient for a foreign plaintiff.

Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001) (citing *Piper*, 454 U.S. at 256).[6]

The *Piper* Court foresaw the burdens that would result from throwing open the doors of U.S. courts to foreign plaintiffs for disputes having no connection with the United States: "The American courts, which are already extremely attractive to foreign plaintiffs, . . . would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts." 454 U.S. at 252. U.S. courts are more, not less, congested than when *Piper* was decided. Further,

> [t]o insist that American courts hear cases where the balance of convenience and the interests of justice

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[6] *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) ("A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."); *Pollux Holding Ltd. v. Chase Manhattan Bank, N.A.*, 329 F. 3d 64, 71 (2d Cir. 2003) ("[T]he level of deference given to a plaintiff's choice of forum depends on the *bona fide* connection the plaintiff has with that forum.").

> require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one country will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy.

Howe v. Goldcorp Invs. Ltd., 946 F.2d 944, 950 (1st Cir. 1991) (Breyer, C.J.) (affirming *forum non conveniens* dismissal).[7]

It also visits an unfair burden on taxpayers and citizens to fund and staff the adjudication of actions by foreign plaintiffs that have no connection to the U.S.:

> Courts that have granted *forum non conveniens* dismissals of actions brought by foreign plaintiffs have often cited to the burden that would be imposed on the American judicial system if it heard such actions. One primary justification for dismissing these actions is the view that it would be fundamentally unfair to permit foreign plaintiffs to use already backlogged American courts that are "paid for by U.S. taxpayers and whose juries are composed of U.S. citizens (who) are asked to drop their everyday activities to" help adjudicate an action.

Douglas W. Dunham and Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J.

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[7] *See* Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L. J. 321, 352 (1994) ("The United States is a magnet forum for the afflicted of the world. The costs of litigating here are lower and the recovery is higher. Subjecting United States defendants to suit here by foreigners injured abroad places our companies at a world-wide competitive disadvantage.").

INT'L L. 665, 689 (1999) (citing *Warn v. M/Y Maridome*, 961 F. Supp. 1357, 1378 (S.D. Cal. 1997)).[8]

No case has accorded foreign plaintiffs' election to sue in the U.S. the conclusive deference over the other relevant factors that the Second Circuit's decision did here.[9] Departing

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[8] Another legal commentator has explained that

> [a] good bit of judicial *forum non conveniens* discussion focuses on issues such as court congestion and the burden of jury duty. . . . Moreover, actions brought here by foreign plaintiffs may "entangle the forums in suits with which the forums have at best a tangential connection." As a result of such differential treatment, some might feel uneasy. This is natural; we do not like to admit that we are rationing fundamental resources. On the other hand, the need to do so cannot be ignored, and we should, therefore, encourage courts to focus on the real concerns animating the *forum non conveniens* decision.

William R. Reynolds, The Proper Forum for a Suit: Transnational *Forum Non Conveniens* and Counter-Suit Injunctions in the Federal Courts, 70 TEX. L. REV. 1663, 1693-94 (1992).

[9] *See Piper Aircraft Co. v Reyno*, 454 U.S. 235, 256 n.23 (1981) (noting that even a U.S. "citizen's forum choice should not be given dispositive weight."); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) ("Even after determining whether the plaintiff's choice is entitled to more or less deference, a district court must still conduct the analysis set out in [the Supreme Court's] *Gilbert*, *Koster*, and *Piper* [decisions]."); *accord USHA (India), Ltd. v. Honeywell Int'l, Inc.*, 421 F.3d 129, 134 (2d Cir. 2005) (emphasis added) ("[I]rrespective of the level of such deference, the balance of private and public interests weighs decisively in favor of adjudicating the case in the courts of India rather than in the Southern District of New York."). Justice Scalia, writing in another context, rejected the contention that the Court's decision in that case would expose foreign nations

(Cont'd)

dramatically from precedent, the panel majority held these foreign plaintiffs' decision to sue in the Southern District of New York, with which the case had no contacts, was dispositive. App. 5a-6a. Without finding the Egyptian judicial system inadequate, the majority appears to have assumed that plaintiffs could not obtain relief in Egypt because their claims there, against different defendants, had been dismissed.[10] App. 5a. The record did not support that assumption, however, and the panel majority ignored the District Court's undisputed finding that the plaintiffs' Egyptian court cases had been dismissed because of their own failure to prosecute them, not because the Egyptian judicial system did not afford a remedy.[11]

(Cont'd)

to vast potential liability in U.S. courts for old expropriation claims in part because "the doctrine of *forum non conveniens* will limit the number of suits brought in American courts." *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Scalia, J., concurring). The doctrine could not have that effect if foreign plaintiffs' forum choices were given the virtually conclusive weight announced by Second Circuit's decision.

[10] Because of its incorrect assumption that the plaintiffs could not obtain relief in Egypt, the Second Circuit may have inferred that their New York forum choice was not forum-shopping but "legitimate" and entitled to "more deference." App. 5a. But that leaves the question of why the plaintiffs did not sue in their home forum, Canada. Their preference for New York over Canada strongly suggests forum shopping and, under *Piper*, is entitled to "little weight" and "less deference."

[11] The District Court explained that, "[a]lthough the [plaintiffs] claim that their numerous attempts to litigate their claims in Egypt comprise a 'record of futility,' they do not cite any cause for that futility beyond their own inaction." App. 16a. The Second Circuit panel majority, however, found plaintiffs' preference for U.S. courts "perfectly reasonable" "after [their] efforts to seek relief from the Egyptian authorities proved abortive." App. 5a.

Having accorded the foreign plaintiffs' choice of forum dispositive weight, the majority did not reach the issue of whether Egypt provided an adequate forum. The District Court did so, and found that Egypt provides an adequate alternative forum. It also specifically addressed the plaintiffs' assertion that their religion may disadvantage them in Egyptian courts and found it speculative and unsupported by the record. App. 18a. The plaintiffs argued that, as Jews, they believe Egypt is an inhospitable forum and that their claim arose, at base, from the anti-Semitic policies of a former Egyptian president. Inhospitability, however, is not the legal test. Assuming for the sake of argument that an Egyptian court were less hospitable than a New York court for the plaintiffs to pursue their claims (it might also be inhospitable to American defendants with possible claims over against Egyptian governmental entities), the proper question under the *forum non conveniens* doctrine is the *adequacy* and *convenience* of the alternative forum. If hospitability were to become the litmus test, courts would be enmired in the impossible task of making subjective, anomic, relativistic determinations of levels of hospitability conflicting with the well established *forum non conveniens* analytical factors and not lending themselves to judicial, rather than executive or legislative, consideration.

The District Court's finding that the Egyptian judicial system provides an adequate alternative forum was correct and supported by the record. This Court has directed that strong deference be shown in evaluating other nations' judicial systems and that findings of inadequacy should be "rare." *Piper*, 454 U.S. at 254-55 n.22 (judicial system inadequate only "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all;" "[o]rdinarily, this requirement [of adequacy] will be satisfied when the defendant is 'amenable to process' in the other

jurisdiction") (citation omitted); *Murray v. BBC*, 81 F.3d 287, 292 (2d Cir. 1996) (same).[12] The Egyptian courts have been found adequate alternative forums in other cases. *See Riviera v. Hewlett Packard Corp.*, 95 F. App'x 241 (9th Cir. 2004); *Jackson v. Am. Univ., in Cairo*, 52 F. App'x 518 (D.C. Cir. 2002); *Younis v. Am. Univ., in Cairo*, 30 F. Supp. 2d 390, 394 (S.D.N.Y. 1998) (Egypt adequate alternative forum for action by Canadian plaintiff); *Nippon Fire & Marine Ins. Co. v. M.V. Egasco Star*, 899 F. Supp. 164, 167-68 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 351 (2d Cir. 1996).[13]

The United States Department of State reports that "Egypt's judicial system is based on European ... legal concepts and

[12] The petitioners stipulated to jurisdiction in Egypt. App. 16a.

[13] In line with *Piper*, courts have been loathe to find other nations' judicial systems inadequate, routinely rejecting arguments of inadequacy based on unsupported assertions of judicial or systemic bias or corruption. *E.g., Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Uk.*, 311 F.3d 488 (2d Cir. 2002) (Ukraine); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (Ecuador); *Rustal Trading US, Inc. v. Makki*, 17 F. App'x 331 (6th Cir. 2001) (Sierra Leone); *Blanco v. Banco Indus. de Venezuela*, S.A., 997 F.2d 974 (2d Cir. 1993) (Venezuela); *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415, 425 (S.D.N.Y. 2000) (rejecting argument that "Russian courts discriminate against Latvian litigants" based on political difference and proposed legislation, because "although this proposed [legislative] resolution may be probative of a *political* climate in Russia, it does not provide substantive evidence of any institutional *judicial* bias against Latvians ....") (italics in original); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1077 (S.D.N.Y. 1992) (rejecting argument that Israeli judges had a "negative predisposition" to U.S. plaintiffs in a politically controversial lawsuit, stating that "it will be a black day for comity among sovereign nations when a court of one country, because of a perceived 'negative predisposition,' declares the incompetence or worse of another nation's judicial system."), *aff'd*, 990 F.2d 71 (2d Cir. 1993); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1525-27 (D. Minn. 1966) (Guatemala). As noted, the courts of Egypt have been found to provide an adequate alternative forum, as the District Court found here.

methods. Under the Mubarak government, the courts have demonstrated increasing independence, and the principles of due process and judicial review have gained greater respect. The legal code is derived largely from the Napoleonic Code." U.S. Department of State, Bureau of Eastern Affairs, Aug. 2006, *http://www.state.gov/r/pa/ei/bgn/5309.htm*. Additionally, a study for the United Nations found that "Egypt has one of the most highly developed and influential judicial structures in the Arab world," and that the "Egyptian judiciary [is] one of the most independent in the Arab world." Nathan J. Brown, *Arab Judicial Structures: A Study Presented to the United Nations Development Program, http://www.pogar.org/publications/judiciary/nbrown/Egypt. html* (last visited Jan. 29, 2007). Egypt's constitution recognizes both the freedom of religion (Art. 46) and the right to expeditious litigation (Art. 68) (Egyptian Constitution art. 46, 68). And, as described in a recent annual report on Egypt by the National Council for Human Rights, chaired by Dr. Boutros Boutros Ghali:

> The Egyptian legal system provides for national means of remedy for victims and injured parties in respect of any violations relating to the rights and freedoms protected by the Constitution and law. This is regardless of whether they are committed by public authority officials or others, and whether they represent an offence or relate to decisions issued by the administrative bodies with the discharge of their functions stipulated therefor by law.

Arab Republic of Egypt National Council for Human Rights, Annual Report of The National Council for Human Rights (2004/2005) at 44-45, http://www.nchr. org. eg/annual_pdf/ annual_report_en.pdf (last visited Jan. 29, 2007).

The District Court held that the plaintiffs' arguments regarding Egypt were not supported by the record. The plaintiffs submitted no evidence of jeopardy to their lives or safety from litigating in Egypt and the newspaper articles they offered actually undermined their argument. App. 16a. They themselves had filed and renewed several similar lawsuits in Egyptian courts in 1980 and again in 1993-1997, asserting similar claims against different defendants concerning the same Egyptian property, and those suits were dismissed because they failed to prosecute them. App. 10a-11a, 16a.

Even assuming for the sake of argument that Egyptian courts do not provide an adequate alternative forum, the majority's decision would still be plain error. The proper course was to remand for consideration of the adequacy of the other alternative forum, Canada, the plaintiffs' *home* forum. The District Court noted that alternative but did not rule on it given its conclusion that all the *forum non conveniens* factors strongly favored Egypt. Canadian courts provide an adequate alternative forum.[14] The parties all are amenable or consent to jurisdiction in Canada. Litigating in Canada would presumably be more convenient than New York for the plaintiffs and no less convenient for the petitioners or the foreign witnesses. The panel majority erred in peremptorily deciding that there was no need to consider Canada.

These plaintiffs, instead of proceeding in Egypt with "undeniably strong" connections to the dispute or their home forum of Canada, chose to sue in the Southern District of New York where "nothing at all" relevant to this dispute occurred, where there are no witnesses or documents, and which does not

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[14] *E.g., McNeil v. Stanley Works*, 33 F. App'x 322 (9th Cir. 2002); *Stewart v. Dow Chem. Co.*, 865 F.2d 103 (6th Cir. 1989); *Florian v. Danaher Corp.*, No. Civ. A. 300CV897, 2001 WL 1504493 (D. Conn. Nov. 20, 2001), *aff'd*, 69 F. App'x 473 (2d Cir. 2003).

supply the governing law. App. 20a. Their forum choice was not driven by necessity but by forum shopping. Under *Piper*, it was entitled to little or no deference, and the Second Circuit panel majority committed plain error by adopting and applying a standard that instead accorded it virtually conclusive weight.

II. The Second Circuit's Decision Directly Contravenes *Piper* and the Law of the Other Circuits by Adopting an Appellate Review Standard that Removes the Fact-Intensive *Forum Non Conveniens* Decision from the Trial Court's Sound Discretion Without a Finding of Clear Abuse of Discretion

The District Court conducted a detailed analysis of all of the private and public interest factors that form the framework of *forum non conveniens* analysis. The Second Circuit did not find any of the District Court's fact findings to be clearly erroneous. It did not hold that the District Court had abused its discretion. Yet, the panel majority disregarded *Piper* and the precedent in other Circuits by announcing and applying a standard of *de novo* appellate review, substituting its discretion for the discretion of the District Court, and holding that the plaintiffs' New York choice of forum was "reasonable." Recognizing this Court's allocation of decision-making authority, Judge Leval dissented, objecting to the panel majority's undertaking of a *de novo* analysis and pointing out that the case instead should have been remanded to the District Court with instructions: "[T]he proper outcome of this complex question upon application of the correct test is not clear, and may involve discretionary findings on disputed facts" that "should be resolved in the first instance by the district court." App. 7a.

Piper clearly held, "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a *clear abuse of discretion*." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (emphasis added). *Accord*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512 (1947); *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 531-32 (1947); *see Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). In *Piper*, the Court reversed and reinstated the District Court's decision because "the Court of Appeals seem[ed] to have lost sight of this rule, and substituted its own judgment for that of the District Court." *Id.*

The other Circuits have applied this rule of limited appellate review, and the Second Circuit's decision creates a split in the Circuits. *E.g.*, *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 951 (1st Cir. 1991) (Breyer, C.J.) (district court's determination "may be reversed only where there has been a clear abuse of discretion") (quoting *Piper*, 454 U.S. at 254). *Accord SSI Corp. v. Matsuda*, 175 F. App'x 168, 169 (9th Cir. 2006) ("We review the district court's dismissal narrowly for a clear abuse of discretion."); *Basquez v. Bridgestone/Firestone*, 325 F.3d 665, 671 (5th Cir. 2003) (*forum non conveniens* dismissal is reviewed for an abuse of discretion); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir. 2001) ("We review a dismissal based on *forum non conveniens* only for abuse of discretion."). Indeed, until the decision below, the Second Circuit itself adhered to this rule.[15]

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[15] In what was previously considered an "authoritative statement" of *forum non conveniens* law in the Second Circuit, the court held that "[t]he decision to dismiss a case on forum non conveniens grounds 'lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been clearly abused.'" *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (quoting *Scottish Air Int'l*, (Cont'd)

The rule of limited appellate review is grounded in sound logic and judicial policy. The trial court is best positioned to conduct the fact-intensive balancing on a complete, and often complicated, factual record. *See Am. Dredging Co.*, 510 U.S. at 455 (noting "the discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application," that "'each case turns on its facts,' [and that the Court has] repeatedly rejected the use of *per se* rules in applying the doctrine"); *Gilbert*, 330 U.S. at 508, 512 (reinstating district court's discretionary dismissal, noting that,

> [w]isely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.);

Howe v. Goldcorp Invs., Ltd., , 946 F.2d 944, 947, 953 (1st Cir. 1991) (Breyer, C.J.) ("The Court has stressed that the doctrine is 'flexible,' that its 'contours' are not 'rigid,' and that, in applying it, courts are to take account of many 'considerations' related to fairness and convenience.").

(Cont'd)

Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1232 (2d Cir. 1996)). *Accord, Pollux Holding Ltd. v. Chase Manhattan Bank, N.A.*, 329 F.3d 64, 70 (2d Cir. 2003) ("A district court's decision to dismiss by reason of *forum non conveniens* is confided to the sound discretion of the trial court, to which substantial deference is given. Such a decision may be overturned only when we believe that the trial court has clearly abused its discretion.") (citations omitted); *Capital Currency Exch., N.V. v Nat'l Westminster Bank PLC.*, 155 F.3d 603, 609 (2d Cir. 1998) ("Our review of a *forum non conveniens* dismissal is extremely limited.").

The panel majority disagreed with the District Court's weighing of the plaintiffs' forum choice against the other relevant *forum non conveniens* factors. Having identified its concern about the District Court's evaluation of that factor, the proper course would have been to remand with instructions for the District Court to reconsider that factor and explain the weight to be given it in this case, an explanation the District Court may have omitted because it found the other factors overwhelmingly to favor Egypt.[16] That would have given effect to the allocation of judicial decision-making authority established in *Piper* and followed by the other Circuits.[17] It was plain error for the Second Circuit to adopt a different standard, entirely displacing the District Court's discretionary decision.

De novo review in the absence of clearly erroneous fact findings or a clear abuse of discretion is entirely at odds with the established standard of appellate review. The principle of

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[16] *See Empresa Lineas Maritimas Argentinas, S.A. v. Shichau-Unterweser, A.G.*, 955 F.2d 368, 373-74 (5th Cir. 1992) ("The district court's order recited the analytical framework for considering [defendant's] motion...and the court specifically noted that [plaintiff] was a foreign party. While the district court should have supplied more explanation, we cannot say that the court failed to consider [plaintiff's] status or abused its discretion in declining to make the desired finding.") (citing *Piper*).

[17] *E.g., Yavuz v. 61 MM, Ltd.*, 465 F.3d 418 (10th Cir. 2006) (reversing and remanding for district court to engage in *forum non conveniens* balancing of conveniences); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1143 (9th Cir. 2004) (vacating and remanding for district court to reconsider *forum non conveniens* issue in light of court's vacatur of forum selection clause issue); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996) (remanding for district court to determine whether Jordan was an adequate alternate forum).

limited appellate review is important, and the Second Circuit's dramatic departure from the established law is particularly troublesome because of that court's influence on judicial thought and the heavy concentration of international disputes in its districts, where *forum non conveniens* issues are most likely to arise. In order to uphold important precedent and maintain uniformity among the Circuits on a crucial issue of appellate practice in international disputes, the petitioners urge the Court to grant this petition and reverse.

III. The Decision Below Should Be Reversed and the District Court's Decision Should Be Reinstated

Even "[a] citizen's forum choice should not be given dispositive weight. . . ." *Piper*, 454 U.S. at 256. The District Court found on the record that all *forum non conveniens* factors other than plaintiffs' forum choice strongly favored dismissal in favor of Egyptian courts. In reversing, the Second Circuit brushed aside the District Court's careful assessment of the *Gilbert* private interest factors with the perfunctory assertion that "it cannot be said that there are private inconveniences present here that outweigh the deference that the district court should have accorded plaintiffs' choice of forum." This comment illuminates the panel majority's clear error: its focus was on elevating the forum choice factor over all other factors.

The panel majority also gave short shrift to the *Gilbert* public interest factors, each of which the District Court evaluated carefully in concluding that they "overwhelmingly favor Egypt as the more appropriate forum." App. 20a. The panel majority asserted that this "suit is primarily over whether a United States company should be liable in damages" and found that the District

Court failed to give due deference to the plaintiffs' "legitimate choice of forum." App. 6a. That was a mischaracterization of the case but, even if true, it ignored the established requirement to consider and weigh all the multifarious factors relevant to *forum non conveniens* analysis. *See* pages 22-23 above.

The panel majority also disregarded Egypt's obvious and significant interest in deciding this controversy involving Egyptian real property, Egyptian law, and Egyptian governmental actions. Its reason for not taking Egypt's interest into account, it said, was because the Egyptian government did not interpose a diplomatic protest in the lawsuit. *Id.* That, however, has never been the test of public interest. In a phrase often quoted, *Gilbert* explained that there "is a local interest in having localized controversies decided at home." 330 U.S. at 509. Further,

> [t]here is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. *Id.*

Accord, Piper, 454 U.S. at 263 ("The doctrine of *forum non conveniens*...is designed in part to help courts avoid complex exercises in comparative law.").

The District Court grappled in its opinion with questions of foreign law, the Egyptian government's interest in the subject matter of the dispute, and the need for consistency of interpretation of the governing law. It evaluated Egypt's adequacy as an alternative forum. It analyzed each of the

"private" and "public" interest factors. It stated its awareness that some deference should be accorded to plaintiffs' forum choice but found that factor outweighed. It evaluated the facts that were established by the record and it rejected arguments not founded in the record.

The District Court's discretionary analysis is entitled to deference if there was no "clear abuse of discretion." That is the case here. The Second Circuit found neither plainly erroneous fact finding nor abuse of discretion. As it did in *Piper*, 454 U.S. at 268, and *Gilbert*, 330 U.S. at 512, the Court should reverse and reinstate the District Court's discretionary decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MAY 9, 2006

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 05-2426-CV.

Raphael BIGIO, Bahia Bigio, Ferial Salma Bigio, and B. Bigio & Co.,

Plaintiffs-Appellants,

v.

The COCA-COLA COMPANY and The Coca-Cola Export Corporation,

Defendants-Appellees.

Argued: March 16, 2006.
Decided: May 9, 2006.

Before: JACOBS and LEVAL, Circuit Judges, and RAKOFF, District Judge.*

RAKOFF, District Judge.

Plaintiffs-three members of the Bigio family and a company they control (collectively, the "Bigios")-appeal from

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

the dismissal of their suit against the Coca-Cola Company and its wholly owned subsidiary (collectively, "Coca-Cola"). When this case was previously before this Court, *see Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir.2000), the pertinent allegations were stated in some detail, so here they may be stated briefly. The Bigios had large commercial holdings in Egypt that were wrongfully seized during the Nasser regime because the Bigio family was Jewish. The Bigio family then fled to Canada, but, after Nasser died, the Egyptian Government ordered the property returned to the Bigios. However, the state-owned entity then holding the property refused to comply and, instead, sold or, according to defendants, leased the bottling plant here in issue to a joint venture in which a substantial interest was purchased by the Bigios' former tenant, Coca-Cola, which rejected the Bigios' claims to ownership. Unable to obtain relief in the Egyptian courts, the Bigios brought suit in the United States against Coca-Cola for violation of the Alien Tort Claims Act and for common law claims such as conversion.

In our previous decision, we affirmed the district court's dismissal of the claim under the Alien Tort Claims Act but reversed its dismissal of the common law claims pursuant to the "Act-of-State" doctrine. We found the Act-of-State doctrine inapplicable because "the resolution of this case by United States courts will not likely impact on international relations or embarrass or hinder the executive in the realm of foreign relations." *Bigio,* 239 F.3d at 452 (internal quotation marks omitted). On remand, the district court again dismissed the remaining claims, this time on the ground of international comity or, in the alternative, on the ground of *forum non conveniens. Bigio v. Coca-Cola Co.*, No. 97 Civ.

Appendix A

2858, 2005 WL 287397, 2005 U.S. Dist. LEXIS 1587 (S.D.N.Y. Feb. 3, 2005). Plaintiffs appeal from that decision.

As to international comity, while application of this doctrine ordinarily lies within the discretion of the district court, in this instance no such deference is appropriate because the district court applied the wrong legal standard. Specifically, the district court applied the seven-factor test articulated in *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Savings Ass'n,* 749 F.2d 1378 (9th Cir.1984). That test is used to determine whether a court should apply United States law extraterritorially, *see O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A.,* 830 F.2d 449 (2d Cir.1987), but that is not in issue here. Rather, the only issue of international comity properly raised here is whether adjudication of this case by a United States court would offend "amicable working relationships" with Egypt. *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.,* 412 F.3d 418, 423 (2d Cir.2005). *Cf. In re Maxwell Comm. Corp.,* 93 F.3d 1036, 1047 (2d Cir.1996) ("We realize that 'international comity' may describe two distinct doctrines: as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts."). *See generally Hilton v. Guyot,* 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

Throughout the long pendency of this lawsuit, the Government of Egypt has never raised the slightest objection to adjudication of the instant controversy by United States

courts. *Cf. Jota v. Texaco Inc.*, 157 F.3d 153, 157 (2d Cir.1998). Moreover, this Court has already determined that resolution of this case by United States courts will "not likely impact on international relations" with Egypt. *Bigio*, 239 F.3d at 452 (internal quotation marks omitted). In its present posture, this is a common law suit for damages primarily between Canadian citizens and a United States company,[1] which may likely focus on what Coca-Cola knew about the Bigios' ownership rights before it acquired its present interest in the Egyptian bottling plant. While adjudication of plaintiffs' common law claims may also require some modest application of Egyptian law, *see Bigio*, 239 F.3d at 454, the courts of this Circuit are regularly called upon to interpret foreign law without thereby offending principles of international comity. *See, e.g., United States v. Schultz*, 333 F.3d 393 (2d Cir.2003) (Egyptian law); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70 (2d Cir.2002) (Indonesian law); *cf. First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir.1998).

As for *forum non conveniens*, the issue, once again, is not whether the district court abused its broad discretion, but whether it misapprehended or misapplied the relevant legal standards. *See Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir.2001) (*en banc*) ("In our recent cases, we vacated dismissals for *forum non conveniens* because we believed that the district courts had misapplied the basic rules

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1. Whether one or more Egyptian entities are indispensable parties to this lawsuit remains for the district court to determine in the first instance. *Bigio*, 239 F.3d at 455.

. . . ."). Here, the district court, while reciting the principle that even a foreign plaintiff's decision to sue in a U.S. forum is entitled to some weight, *Bigio,* 2005 WL 287397 at *4-5, 2005 U.S. Dist. LEXIS 1587, at *12, appears, so far as its discussion of the balance of conveniences is concerned, to have given the plaintiffs' choice of forum no weight whatsoever, *id.* 2005 WL 287397 at * 5-6, at *14-17. But as we emphasized in our *en banc* decision in *Iragorri,* the more that a plaintiff, even a foreign plaintiff, chooses to sue in a United States court for "legitimate reasons," the more deference must be given to that choice. *Iragorri,* 274 F.3d at 73. Furthermore, even where the degree of deference is reduced, "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable." *Id.* at 74-75.

Here, the district court appears to have overlooked the legitimate and substantial reasons for plaintiffs choosing to bring this suit in defendants' own country, the United States, rather than in Egypt, after plaintiffs' efforts to seek relief from the Egyptian authorities proved abortive. It was perfectly reasonable under these circumstances for the plaintiffs to bring their action against Coca-Cola, the only U.S. company involved, in the United States. While conceivably they might have brought it in Canada (their home base) or in a different district of the United States, those possibilities are not determinative here, for the motion that the district court granted was a motion to dismiss in favor of the courts of Egypt and the only comparison it made was between the U.S. forum and the Egyptian forum. Given the history outlined above, the plaintiffs' choice of the U.S. forum over an Egyptian forum was eminently reasonable and

entitled to considerable deference, which the district court failed to give.

Furthermore, counsel suggest that a major focus of the litigation may be whether Coca-Cola knew before it purchased its interest in the joint venture that owns or (defendants say) leases the bottling plant that the plant had been ordered to be returned to the Bigios. The key witnesses to this issue either reside in the United States or Canada or are readily producible here; and to the extent there are witnesses abroad who are beyond the court's subpoena power, their testimony can be provided by depositions taken pursuant to letters rogatory. *See, e.g., Overseas Programming Companies v. Cinematographische Commerz-Anstalt,* 684 F.2d 232, 235 (2d Cir.1982). Likewise, the parties and their attorneys are all located in the United States or Canada. More generally, it cannot be said that there are private inconveniences present here that outweigh the deference that the district court should have accorded plaintiffs' choice of forum.

Likewise, in evaluating the "public interest" factors of inconvenience, *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the district court again failed to take account of the deference due the plaintiffs' legitimate choice of forum. Relatedly, the district court stated that "Egypt's interest in deciding this controversy is significant," *Bigio,* 2005 WL 287397 at * 5-6, 2005 U.S. Dist. LEXIS 1587, at *17, whereas the suit is primarily over whether a United States company should be liable in damages. And, as noted, Egypt has never raised any objection to the U.S. court deciding this case.

Appendix A

Upon careful review of the record, we are convinced that none of the alleged private or public inconveniences referenced by the district court overcomes the preference reasonably here accorded plaintiffs in their choice of a U.S. forum and that the dismissal of this case on grounds of international comity and *forum non conveniens* was therefore erroneous as a matter of law. *See generally Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir.2000). Accordingly, we reverse and remand to the district court for further proceedings consistent with this opinion.

LEVAL, J., dissenting in part.

I agree with the majority opinion that the district court applied the wrong test to determine whether the doctrine of *forum non conveniens* calls for dismissal of the case. In my view, however, the proper outcome of this complex question upon application of the correct test is not clear, and may involve discretionary findings on disputed facts. *See Iragorri v. United Technologies Corp.*, 274 F.3d 65, 72 (2d Cir.2001) (en banc) (noting, for example, that plaintiffs' choice of forum is entitled to greater deference when the choice is motivated by convenience and less deference when motivated by forum-shopping reasons, listing relevant factors). It should be resolved in the first instance by the district court. I would have vacated the judgment and remanded for reconsideration under the proper test.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 3, 2005

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 97 Civ. 2858(BSJ).

Raphael BIGIO, Bahia Bigio, Ferial Salma Bigio, and B. Bigio & Co.,

Plaintiffs,

v.

THE COCA-COLA COMPANY and The Coca-Cola Export Corporation,

Defendants.

Feb. 3, 2005.

Opinion

JONES, J.

This case arises out of a seizure and confiscation of foreign property allegedly in violation of New York State law. The Plaintiffs, Raphael Bigio, Bahia Bigio, Ferial Salma Bigio and B. Bigio & Co. (collectively, "the Bigios") seek damages from the Defendants, The Coca-Cola Company and The Coca-Cola Export Corporation (collectively, "Coca-Cola"), for their conduct in connection with the

nationalization of the Bigios' property by the Egyptian government in the early 1960s. Specifically, Plaintiffs seek damages for conversion. Defendants move to dismiss the Complaint on the grounds of: (1) international comity; (2) forum non conveniens; (3) failure to state a claim; (4) failure to join two indispensable parties; (5) and that the claims are time barred.

BACKGROUND

The factual history of this action is set forth at length in a previous district court opinion, *Bigio v. Coca-Cola Co.*, 1998 U.S. Dist. LEXIS 8295 (S.D.N.Y. June 5, 1998), dismissing Plaintiffs' complaint because Plaintiffs had not satisfied the prerequisites for jurisdiction under the Alien Tort Claims Act, and because the act of state doctrine barred the court's exercise of jurisdiction despite the parties' diversity of citizenship. The Court of Appeals subsequently affirmed that Plaintiffs had no claims under the Alien Tort Claims Act, but reversed the District Court's holding that the act of state doctrine barred the claims. Finding diversity jurisdiction, the Circuit Court remanded for consideration of whether the principle of international comity barred consideration of the case. *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir.2001). Familiarity with those opinions is assumed, and only a brief summary of the facts appears here.

Plaintiffs Raphael Bigio, his sister Ferial Salma Bigio, and their mother Bahia Bigio are citizens and residents of Canada. Plaintiff B. Bigio & Co. is a company owned by the Bigio family, organized in Egypt in the early 1930s. Defendants the Coca-Cola Company and the Coca-Cola

Appendix B

Export Company are incorporated in the State of Delaware and headquartered in Atlanta, Georgia. The Coca-Cola Export Company is a wholly owned subsidiary of the Coca-Cola Company.

The property that is the subject of this action consists of land and factories located in Heliopolis, Egypt, a suburb of Cairo. The Bigios contend that the Egyptian government under President Gamal Abdel-Nasser sequestered and nationalized their property in 1962 because they were Jewish. The Bigios left Egypt in 1965 without having received compensation.

Once the Egyptian government seized Plaintiffs' property it transferred ownership to the Misr Insurance Company ("Misr"), a company wholly owned by the Egyptian government. Misr in turn leased the property to the El-Nasr Bottling Company ("ENBC"), another company wholly owned by the Egyptian government.

In 1977, after the death of President Nasser, the Egyptian government apparently issued an edict revoking the contracts of sale that had effected the transfer of the Bigios' property to Misr. In 1979, purportedly pursuant to this edict, the Egyptian Ministry of Finance issued Decision Number 335, which ordered Misr to return the Bigios' property, along with any rental burden and active occupants, or to forward to the Bigios the proceeds of any sale of the property that might have occurred. However, Misr did not return the property.

The Bigios brought suit in Egypt in 1980 against Misr, ENBC, and various government agencies. Plaintiffs do not

claim that they have ever sued Coca-Cola in Egypt. Coca-Cola asserts that the 1980 claims were dismissed for failure to prosecute. The Plaintiffs do not dispute this. (Declaration of Ahmed Abou Ali, August 19, 1997, Chart A.)

Coca-Cola began doing business with the Bigio family in 1938. Coca-Cola leased land from the Bigios for its bottling plants and gradually bought bottle caps and other marketing elements from Bigio factories until the family was dispossessed in 1962. From 1967 to 1979 Coca-Cola was barred from doing business in Egypt because it did business in Israel. After the peace treaty between Egypt and Israel, Coca-Cola reentered the Egyptian market. (Defendants' Answers to Interrogatories at 20.) In 1993, Coca-Cola sought to invest in the privatization of ENBC, the Egyptian beverage company.

In 1993, ENBC consisted of a number of distribution and warehousing facilities throughout Egypt and thirteen bottling plants, one of which was located on the Bigios' former property. Two subsidiaries of Coca-Cola Export Company invested in ENBC and currently own 42% of the company. (Defendants' Renewed Motion at 8.)

In February 1994, when Coca-Cola was seeking to buy ENBC, Raphael Bigio contacted Coca-Cola to discuss the Bigios' claims regarding the Heliopolis property. Correspondence and two meetings between the Bigios and the company followed. In July 1995, Coca-Cola advised Mr. Bigio that it would not compensate him. Coca-Cola asserts that its investigation prior to the acquisition led it to conclude

that ENBC, which leased the land from Misr Insurance Company, had no liability to the Bigios.

The plaintiffs filed this lawsuit in the United States District Court for the Southern District of New York on April 21, 1997, seeking compensatory and punitive damages for the defendants' allegedly improper conduct in "converting plaintiffs' assets." Their complaint alleged that Coca-Cola engaged in wrongdoing by "acquiring the assets of ENBC, knowing that plaintiffs had been deprived of their rights to the property solely because of their religious faith."

Judge Martin, in his earlier district court opinion, held that the act of state doctrine applied. The act of state doctrine is an element of abstention doctrine, which refers to a district court's decision not to exercise jurisdiction it has. The Second Circuit examined the abstention issues and disagreed with Judge Martin's holding on the act of state doctrine. Instead, they remanded for this Court to determine whether another abstention doctrine, international comity, applied. *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 451-455 (2d Cir.2000).

DISCUSSION

I. International Comity

International comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

Appendix B

Under the doctrine of international comity, a court declines to exercise jurisdiction it admittedly has and dismisses a complaint in favor of a foreign forum. *See Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 245-46 (2d Cir.1999). The decision whether to dismiss a case on international comity grounds lies within the discretion of the district court. *See id.* at 246; *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir.1998).

International comity is an affirmative defense; the party asserting comity as grounds for dismissal bears the burden of proof. *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198, 212 (S.D.N.Y.2002); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996, 999 (2d Cir.1993).

As the Second Circuit noted, central to an ultimate determination in this case is "the legal effect of the 1977 edict and subsequent instructions issued by the Egyptian government with respect to the Bigios' property." 239 F.3d at 454.

The Defendants meet their burden, demonstrating the need for comity by using the seven-step test laid out by the Ninth Circuit and endorsed by this Circuit. *Timberlane Lumber Co. v. Bank of America Nat'l Trust and Savings Assoc.*, 749 F.2d 1378 (9th Cir.1984); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A .*, 830 F.2d 449, 451 (2d Cir.1987).

The first element of the *Timberlane* test asks the Court to consider the degree of conflict with foreign law or policy.

The degree of conflict here is high. To find the Defendants liable for trespass or conversion of the Bigios' property, this Court would have to determine that the Egyptian governments acts in sequestrating the land were wrongful in the first place, and a government-owned company's refusal to return the property was wrong subsequently. Misr, the state-owned company, presumably believes it has a valid basis under Egyptian law for refusing to abide by the 1977 edict that purported to repair the property to the Bigios. Any adjudication by this Court in Plaintiffs' favor would necessarily entail a determination that the Egyptian government or a state-owned subsidiary, or both, acted contrary to law. This would bring the Court into conflict with Egyptian law and policy, and tips strongly in favor of a comity finding.

The remaining *Timberlane* factors also suggest that deference to Egypt would be appropriate. They are: (2) the nationality of the parties, which is Canadian in the plaintiffs' individual cases, Egyptian in the case of the plaintiff corporation, and American for the defendant corporations; (3) the extent to which enforcement by either the U.S. or Egypt can be expected to achieve compliance, which tips strongly in favor of Egypt given that title to real property is at issue; (4) the relative significance of the effects on the U.S. as compared with those in Egypt, which also tips in favor of Egypt given that there are almost no effects in the United States save the possibility of a small effect on Coca-Cola's balance sheet; (5) and (6) the extent to which there is explicit purpose to harm or effect American commerce, and the foreseeability of such an effect, which is nil; and (7) the relative importance to the violations charged of conduct

within the U.S. as compared with conduct in Egypt, which also tips in favor of Egypt. Although Coca-Cola's decisions about the Heliopolis property may have originated in the U.S., the conduct that is of crucial importance-the conduct of the Egyptian government-happened in Egypt.

In partially reversing the District Court, the Second Circuit noted, "This lawsuit's connection to Egypt is . . . undeniably strong. By contrast, the only connection between this lawsuit and the United States . . . is the identity of the defendants as United States corporations." 239 F.3d at 454. The Circuit also instructed this Court to consider whether an adequate forum for the claim exists in Egypt and whether the defendants are subject to suit there. Notably, these questions overlap with the doctrine of forum non conveniens, which will be addressed below.

A. Adequacy of the Forum

An adequate forum for the claim exists in Egypt. Long after they had left Egypt, the Plaintiffs commenced litigation there-in 1980 and again in 1993. They now allege that continuing anti-Semitism in Egypt makes it too dangerous for them to pursue their action there, but the support they provide for that claim is insufficient.

The Plaintiffs cite an Egyptian newspaper article about this litigation as proof that "the publicity in Egypt obviously makes it life-threatening for the plaintiffs or their counsel to travel to that country or to engage in a public trial in that country." (Mot'n in Opp'n at 2.) The article, provided in full translation by Defendants, is certainly anti-Semitic in tone.

However, nothing in its contents suggests that the Plaintiffs' safety would be jeopardized by litigating in Egypt. Likewise, the news articles cited by Plaintiffs regarding an anti-Semitic Egyptian television show do not demonstrate that Jews litigating in Egyptian courts are in physical danger, nor that the government has endorsed these racist attitudes.

In fact, the article Plaintiffs cite as proof of danger refers to thousands of other pending lawsuits like theirs. Although the Bigios claim that their numerous attempts to litigate their claims in Egypt comprise a "record of futility," they do not cite any cause for that futility beyond their own inaction. (Opp'n Memo at 13.)

B. Jurisdiction over defendant

The other key ingredient to the availability of a foreign forum is the ability to reach the defendant in that forum. In this case the Defendants have stipulated to jurisdiction in Egypt.

The Second Circuit found that this Court *can* decide the controversy, but remanded for consideration of whether it *should*. 239 F.3d at 454. This Court finds that after weighing the factors of an international comity analysis, the case is dismissed.

In the alternative, it is abundantly clear that a forum analysis strongly indicates that the case would be more properly prosecuted in Egypt. Both parties have briefed the

forum non conveniens issue, and the Court will address it now.[1]

II. Forum Non Conveniens

The decision to dismiss a case on forum non conveniens grounds "lies wholly within the broad discretion of the district court." *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1232 (2d Cir.1996).

There is ordinarily a strong presumption in favor of the plaintiff's choice of forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). A foreign plaintiff seeking to litigate in American court is generally given less deference, because the presumption of convenience is diminished. *Id.* Still, "some weight must still be given to a foreign plaintiff's choice of forum." *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 290 (2d Cir.1996). The Plaintiffs are neither citizens nor residents of the United States.

In a forum non conveniens analysis, the court must first determine whether an adequate alternative forum exists. *Carey v. Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir.2004). If one does, the court then evaluates relevant private and public interest factors to determine if the balance of convenience tilts strongly in favor of dismissal. *Id.; see also Piper Aircraft*, 454 U.S. at 254; *Gulf Oil Corp. v. Gilbert*, 339 U.S. 501, 508-09 (1947).

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1. Judge Martin dismissed the case without reaching the forum non conveniens claim. The Defendants preserved it on appeal but did not brief it fully. The issue thus has not been analyzed by either the district court or the circuit court.

Appendix B

A. Egypt as an Adequate Alternative Forum

An alternative forum generally is adequate if "(1) the defendants are subject to service of process there; and (2) the forum permits litigation of the subject matter of the dispute." *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir.2001) (internal citation omitted). Here, Defendants have agreed to accept service in Egypt for this action, (Def. Mem. at 1), and there is no dispute that Egypt permits the litigation of the instant claims.

As discussed above, Plaintiffs claim that their lives would be at risk if they litigated the case in Egypt, but do not provide support enough to convince the Court that this is more than legal theatrics. While this Circuit has recognized that the emotional burden of litigating abroad should be taken into account in a forum non conveniens analysis, the leading case on this factor emphasizes the court's interest in honoring a plaintiff's desire to litigate at home. *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir.2000) (". . . a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum.")

Not only are the Bigios not suing at home, the forum that they claim is emotionally untenable is one in which they have litigated multiple claims since their dispossession. Absent the presumption of convenience created when a plaintiff sues at home, and given the Bigios' willingness to litigate in Egypt over the past decades, the Court finds nothing inadequate about the Egyptian courts as a forum for their claim.

Appendix B

B. Private Interest Factors

The relevant private interest factors include: (a) ease of access to evidence; (b) the availability of compulsory process for the attendance of unwilling witnesses; (c) the cost of willing witnesses' attendance; (d) if relevant, the possibility of a view of premises; and (e) all other factors that might make the trial quicker or less expensive. *Gulf Oil,* 330 U.S. at 508.

Here, the private interests tip in favor of litigating this action in Egypt. The essence of the instant action is what rights, if any, the Bigios have to real property located in Egypt. As two earlier courts have noted, evaluating Plaintiffs' cause of action against Coca-Cola requires first understanding what actions the Egyptian government took regarding the Plaintiffs' property in the early 1960's and late 1970's. *Bigio,* 1998 U.S. Dist. LEXIS 8295, *10-11; *Bigio,* 239 F.3d 440, 453. Although Plaintiffs assert that materials relevant to Coca-Cola's decision to invest in Egypt are located in the United States, the company's liability, if any, cannot be determined without first addressing the status of Plaintiffs' underlying Egyptian claim.

The relevant evidence-the documents, the non-party witnesses, and the property itself-are in Egypt. The documents are presumably in Arabic; many of the witnesses may not speak English. Moreover, Egyptian law as it existed in 1962 and 1977 will be crucial to the case, and an Egyptian court is far better equipped to interpret that law than this Court.

Appendix B

It is worth noting that almost nothing relevant occurred in the United States, and nothing at all in the Southern District of New York. Coca-Cola Export's parent company is headquartered in Atlanta. Coca-Cola executives received and responded to Mr. Raphael Bigio's claims there in 1994. That is the extent of this action's connection to the United States; no connection to this District is alleged.

C. Public Interest Factors

The relevant public interest factors to be weighed in a forum non conveniens inquiry are (a) administrative difficulties associated with court congestion; (b) the unfairness of imposing jury duty on a community with no relation to the litigation; (c) the local interest in having localized controversies decided at home; and (d) avoiding difficult problems in conflict of laws and the application of foreign law. *Gulf Oil,* 330 U.S. at 508-09. Here, the public interest factors overwhelmingly favor Egypt as the more appropriate forum.

Trying this case would require the diversion of resources from other cases having more connection to this district. To allow foreign nationals to bring such suits in this District (or elsewhere in the federal courts) would place a burden on the courts-a burden that would not be justified in light of the de minimis connection between Plaintiffs' loss of property that occurred outside of the United States and this district. It is undisputed that "this Court sits in one of the busiest districts in the country is undeniable, making this one of the congested centers of litigation referred to in [*Gulf Oil*]. The need to guard our docket from disputes with little connection

to this forum is clear . . ." *Doe v. Hyland Therapeutics Div.*, 807 F.Supp. 1117, 1128 (S.D.N.Y.1992).

In addition, "jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil,* 330 U.S. at 501-02.

Lastly, Egypt's interest in deciding this controversy is significant. Not only is Egypt the country with the most significant factual relationship to this litigation, but its strong interest in deciding the subject matter of this controversy is undeniable. As discussed above, the Bigios are not the only family who may have lost property under Nasser's government on account of their religion or ethnicity. Not only are Egyptian courts better prepared to untangle the legal knot of this case, they have a strong interest in maintaining whatever precedent may already have developed on the matter. The intrusion of a United States court could raise precisely the international comity issues that concerned the Second Circuit.

CONCLUSION

Given that the doctrines of international comity and forum non conveniens demand that the case be dismissed, the Court declines to consider other claims made by defendants: failure to state a claim, failure to join indispensable parties, and that the claims are time-barred.

The Clerk of the Court is directed to close the case.

SO ORDERED:

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 31, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:

Docket Number:	05-2426-cv
Short Title:	Bigio v. The Coca-Cola Co.
DC Docket Number:	97-cv-2858
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Barbara Jones

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of October two thousand six.

Bigio v. The Coca-Cola Company

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees The Coca-Cola Company, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

Appendix C

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: s/ [illegible]
Motion Staff Attorney